

* **HIGH COURT OF DELHI : NEW DELHI**

CRP No.163/2010 & CM No.16045/2010

% Judgment reserved on: 07th September, 2010

Judgment delivered on: 13th September, 2010

M/s Goldwin Technology (P) Ltd.
Through Shri Gurcharan Singh,
Authorized representative,
1604, Kalsi Nagar, Dholewal Chowk,
Near Dada Motors, Ludhiana,
Punjab.

....Petitioner

Through: Mr. Abdul Kalam, Advocate

Versus

M/s Electronic Components and Tuners,
Through one of its duly Regd. Partner,
Shri Ashok Kumar Mittal, S-635-D,
Nehru Enclave, School Block,
Shakarpur,
Delhi-110092.

....Respondent

Through: Nemo.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported

in the Digest?

Yes

V.B.Gupta, J.

As per impugned order dated 25th May, 2010, application of petitioner (defendant in trial court) filed under Order 37 Rule 3 (5) of the Code, seeking leave to defend, was dismissed and consequently suit filed by respondent (plaintiff in trial court) was decreed for a sum of Rs. 89,990/- with costs and pendent lite and future interest @ 12% per annum. Counsel fee of Rs.4000/- was also awarded to respondent.

2. The short question which arise for consideration is as to whether against final decree, Revision lies under Section 115 of Code of Civil Procedure (for short as 'Code') or an appeal lies under Section 96 of the Code.

3. It is contended by learned counsel for petitioner that Revision under Section 115 of the Code is maintainable against impugned order. In support learned counsel cited decision of this Court, ***Shri Krishan Bhardwaj Vs. Manohar Lal Gupta, AIR 1977, Delhi 226***, where leave to defend the suit under Order 37 of Code was refused by trial court, the Division Bench observed that; "Revision in the circumstances of the case is competent."

4. As per impugned order, petitioner's application for leave to defend under Order 37 Rule 3 (5) of the Code was dismissed and consequently suit of respondent was decreed. As per Section 96 of the Code, only appeal lies against final decree. Relevant provision of this Section read as under;

“S.96. Appeal from original decree-

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

2. xxxx	xxxx	xxxx
3. xxxx	xxxx	xxxx
4. xxxx	xxxx	xxxx”

5. In *V. S. Saini and another Vs. DCM Ltd., AIR 2004 Delhi 219*, leave to defend was refused in a suit filed under order 37 of the Code, the Court observed;

“The Petitioners in these Revisions were Defendants in sundry summary suits who had unsuccessfully applied for leave to defend those suits. The Respondents have raised the preliminary objection questioning their very maintainability of the Revisions. It is not as if one is on virgin

territory, since this question has been considered by the Division Bench of this Court in *Siri Krishan Bhardwaj v. Manohar Lal Gupta*, AIR1977 Delhi 226 . It had been noted in that Judgment that two Learned Judges had returned divergent opinions on this subject. B.C. Misra, J. had opined that a Revision is maintainable whereas D.K. Kapur, J. took the diametrically opposite view that only an appeal against the decree can be entertained. The Division Bench clarified that a Revision entailed only the bringing of an `error` to the notice of the High Court and conferred no further right of hearing on the aggrieved party. It went on to discuss that an order refusing to grant Leave to Defend has far -reaching consequences and would normally fall within the ambit of the phrase "any case which has been decided", bringing the adjudication to a virtual end so far as the Defendant is concerned. It held that irrespective of the decree that may have been passed, a Revision against such an order is competent. The Division Bench however decided the controversy on the assumption that such orders were not appealable. This view would normally have held sway but for two subsequent events -- firstly the observations of the Hon'ble Supreme Court in *Shah Babulal Khimji v. Jayaben D. Kania*, AIR 1981 SC 1786, and secondly, the enforcement of the amendments carried to Section 115 of the CPC by Act 46 of 1999 with effect from 1.7.2002.

It may also be mentioned that S.N. Kapoor, J. has followed *Siri Krishan's* case (supra) in *M/s. Skylark Motors v. Lakshmi Commercial Bank Limited*, AIR 1997 Delhi 46, but *Babulal Khimji's* case (supra) was neither cited nor discussed by my Learned Brother. Copies of orders of various other Benches have also been filed where Revision petitions against similar orders passed under Order

XXXVII of the CPC had been heard and decided. None of these decisions, however, contain a discussion of whether revisory powers ought to have been exercised instead of directing the Petitioner to seek its remedy by way of an Appeal.

In Babulal Khimji's case (*supra*) a suit had been filed on the Original side of the Bombay High Court for the Specific Performance of a contract, in which proceedings the interim relief of the appointment of a Receiver of the suit property had been prayed for. The Learned Single Judge had declined the relief of the appointment of a Receiver and had also not granted the interim injunction prayed for. The ensuing appeal was dismissed by the Division Bench as not maintainable on the ground that the impugned order was not a 'Judgment' as contemplated by Clause 15 of the Letters Patent of the High Court. No doubt, in the course of its detailed Judgment the Hon'ble Supreme Court had clarified that the Court was not concerned with the revisional powers of the High Court (paragraph 75). The Apex Court took note of the fact that unless such interlocutory orders were to be held analogous to a judgment, these orders would be impervious to an attack except in the Supreme Court. The favoured view was the treating of such orders as judgments, so as to be amenable to judicial review under the Letters Patent. In the 120th paragraph the Court enumerated some illustrations of interlocutory orders which may be treated as judgments within the meaning of Letters Patent, one of which is an order declining Leave to Defend the suit in an action under Order XXXVII of the CPC. Counsel for the Revisionist have strenuously submitted that the observations must be restricted only to cases of Letters Patent and not where the High Court exercises powers under Section 115 of the CPC in

respect of such orders passed in the District Courts. Although this contention is attractive, in view of the settled position that even obiter dicta of the Supreme Court is binding on all the other Courts, the observation of the Apex Court that an interlocutory Order such as the refusal to permit Leave to Defend is a "judgment", renders the decision in *Siri Krishna's Judgment* ineffectual. On a deeper cogitation, it appears to me that if an order in respect of which the redress of an appeal has deliberately and consciously not been formally provided for can nevertheless be assailed in appeal by deeming or treating it as a judgment, no other remedy can be legitimately invoked where an appeal is eventually available against an order. therefore, in my opinion the *Khimji dicta* would apply a fortiori to legal assaults of the present genre, where the unsuccessful defendant can certainly avail of a second opportunity to present its defense by way of filing an appeal.”

6. It further observed;

“If an order declining leave to defend a summary suit thereby making a judgment inevitable can be attacked in a Revision and also in an Appeal, it would lead to the anomalous situation where a summary suit becomes more tedious and time consuming than an ordinary action for recovery of money. I would assiduously endeavor to eradicate a regime allowing multitudinous avenues of redressal. In the wake of the amendments effected to Section 115 of the CPC a Revision can no longer be preferred on the ground that the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury. In preferring the conclusion that these Revisions are not maintainable, the Plaintiff/Defendants have not been adversely placed. The judgment can be

assailed in an appeal, the only difference being the necessity to pay ad valorem court fees. This scarcely warrants any thought keeping in perspective that the alternative would inexorably lead to a multiplicity and plenitude of reliefs.

Applying the dicta of the Hon'ble Supreme Court in Khimji's case I have no hesitation in holding that a Revision is not maintainable against the refusal to grant Leave to Defend a summary suit. After the judgment is passed the Defendant may assail the decision by way of an appeal. In the event that conditional leave has been allowed to the Defendant he must abide it and perform the obligations cast upon him or face the inevitability of a judgment being pronounced against him because of non-compliance of the conditions. It would be incongruous if he were to be better placed than the Defendant who has been denied leave to defend altogether”.

7. In *Hyderabad Allwyn Metal Works Ltd Vs. Ramjas Foundation*, 27 (1985) Delhi Law times 336, another decision of this Court, it was observed;

“Admittedly, this revision petition has been filed against the judgment and decree of the Additional District Judge on original side. The remedy of the petitioner was two-fold. He could either make an application for setting aside this decree or he could prefer an appeal under section 96 CPC. He has chosen neither of the two remedies. The reason for not doing so is obvious. If he were to choose appropriate remedy of appeal, he had to pay advalorem court-fees and he had further either to

deposit the decretal amount in the court or to furnish security as the court in its discretion might have directed. This is normally envisaged by order 41, rule I sub-rule (iii) CPC. In all probability, therefore, in order to avoid payment of court fees or depositing the amount in the court the petitioner chose a wrong remedy. The judgment and decree against which, grievance is made in this petition is appealable. The revision is not maintainable”.

8. Thus keeping in view the law laid down by Supreme Court in Khimji case (supra), present revision petition is not maintainable, as appeal lies against impugned order.

9. Accordingly, present petition is hereby dismissed.

+CM No.16045/2010

10. Dismissed.

11. List for compliance on 25th October, 2010.

V.B. GUPTA, J.

13th September, 2010
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